A **RHB BANK BERHAD**

v.

MOON TRADING SDN BHD

B COURT OF APPEAL, PUTRAJAYA
ABDUL MALIK ISHAK JCA
ALIZATUL KHAIR OSMAN JCA
AZIAH ALI JCA
[CIVIL APPEAL NO: W-02-615-03-2012]
C 2 DECEMBER 2013

TORT: *Defamation - Defamatory statements - Banking - Bank draft dishonoured on allegation of counterfeit - E-mail sent with copy of bank draft attached to notify customer that bank draft was dishonoured - Bank* D *draft labelled with word 'counterfeit' - Whether appellant had published statement that bank draft was counterfeit - Relationship of master and servant - Whether existed between parties - Whether appellant could be held liable for defamation - Vicarious liability - Whether proved*

BANK: *Banker and customer - Bank draft - Bank draft dishonoured* E *on allegation of counterfeit - E-mail sent with copy of bank draft attached to notify customer that bank draft was dishonoured - Bank draft labelled with word 'counterfeit' - Whether appellant could be held liable for defamation - Vicarious liability - Whether proved*

F The respondent had purchased a bank draft in the sum of USD$2,985 payable to the respondent's supplier, an American company known as Pest Fog Sales Corporation ('Pest Fog') and the clearance of the bank draft was to be made through Citibank (New York State) for Citibank NA. Pest Fog presented the bank G draft for payment but the same was dishonoured by Citibank NA as it was alleged that it was a counterfeit instrument. Citigroup then sent an e-mail to the American Bank to inform them that the bank draft was a counterfeit. Attached together with the e-mail was a copy of the bank draft labelled with the word 'counterfeit' H by Citibank NA. The respondent submitted that there was a simple mistake committed by the appellant when issuing the bank draft at the branch level or when it was compiling the data. Instead of keying in '3017', being the branch number assigned by the Citigroup corporate and investment banking in order to I recognise and acknowledge the bank draft, the appellant had

mistakenly entered '0084', which was its own internal branch code, into the system. This caused the bank draft to be unrecognisable by Citigroup. The High Court found the appellant, as a master, was vicariously liable for defamation for the act of its servant, Citibank NA. Aggrieved, the appellant appealed against the said decision. The issues that arose for the court's determination was whether the appellant could be held liable for defamation when it was Citibank NA which had published the defamatory statement that the bank draft was a counterfeit.

Held (allowing appeal with costs)
Per Abdul Malik Ishak JCA delivering the judgment of the court:

(1) The principle of vicarious liability has no place in the law of defamation. It was Citibank NA, the publisher of the defamatory statement that should be liable for defamation. The appellant could not be held vicariously liable for the defamatory statement made by Citibank NA. Citibank NA was not even the appellant's employee but was only the paying agent bank in America. (paras 27 & 28)

(2) It was wrong for the High Court to equate the appellant as the master and Citibank NA as the appellant's servant and flowing from that, found the appellant vicariously liable. Citibank NA was not an employee of the appellant and the former was an independent bank in its own right. Undisputed evidence showed that the appellant had no control or authority over Citibank NA and that the latter processed the bank draft in accordance with their security processes. The absence of control could not be challenged and it remained a permanent feature in the present appeal. (paras 35, 37 & 42)

(3) The respondent must not only prove that the appellant had published the defamatory remarks and that they are defamatory, it must also identify itself as the party defamed. Here, the words did not refer to the respondent. The words were not reasonably capable of bearing a meaning defamatory of the respondent. No reference whatsoever was made about the respondent. The respondent did not appear on the face of the demand draft, the e-mail or in the attachment. (paras 54, 60 & 61)

(4) The respondent had failed to prove all the ingredients for action for libel. To compound the matter further, the wrong party was being sued. Evidence showed that the labelling of the word 'counterfeit' on the demand draft together with circulation of the e-mail and attachment were done by Citibank NA. The appellant had no control over what Citibank NA did. (paras 62 & 63)

Bahasa Malaysia *Translation Of Headnotes*

Responden telah membeli draf bank berjumlah USD$2,985 yang perlu dibayar kepada pembekal responden, sebuah syarikat Amerika yang dikenali sebagai Pest Fog Sales Corporation ('Pest Fog') dan penunaian draf bank perlu dibuat melalui Citibank (New York State) bagi Citibank NA. Pest Fog telah mengemukakan draf bank bagi pembayaran tetapi draf bank tersebut telah tidak dilayan oleh Citibank NA kerana didakwa sebagai satu instrumen palsu. Citigroup kemudiannya menghantar e-mel kepada Bank Amerika untuk memaklumkan kepada mereka bahawa draf bank adalah palsu. Dilampirkan bersama-sama dalam e-mel tersebut adalah sesalinan draf bank yang dilabelkan dengan perkataan 'counterfeit' oleh Citibank NA. Responden menghujahkan bahawa terdapat kesilapan kecil yang dilakukan oleh perayu ketika mengeluarkan draf bank di peringkat cawangan atau ketika ia mengumpul data. Ia sepatutnya memasukkan '3017', iaitu nombor cawangan yang diberikan oleh perbankan pelaburan dan korporat Citigroup untuk mengiktiraf dan memperakui draf bank, tetapi perayu telah dengan silap memasukkan '0084', iaitu kod dalaman cawangannya, ke dalam sistem. Ini menyebabkan draf bank tidak boleh diiktiraf oleh Citigroup. Mahkamah Tinggi memutuskan bahawa perayu, sebagai majikan, bertanggungan secara vikarius bagi fitnah atas tindakan pekerjanya, Citibank NA. Terkilan, perayu merayu terhadap keputusan tersebut. Isu-isu yang berbangkit bagi pemutusan mahkamah adalah sama ada perayu boleh bertanggungan ke atas fitnah sedangkan Citibank yang telah menerbitkan kenyataan fitnah bahawa draf bank tersebut adalah palsu.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Abdul Malik Ishak HMR menyampaikan penghakiman mahkamah:

(1) Prinsip liabiliti vikarius tidak mempunyai kedudukan di bawah undang-undang fitnah. Citibank NA, iaitu pihak yang telah menerbitkan kenyataan memfitnah tersebut yang sepatutnya

bertanggungan bagi fitnah. Perayu tidak boleh diputuskan sebagai bertanggungan secara vikarius bagi kenyataan memfitnah yang dibuat oleh Citibank NA. Citibank NA bukan pekerja perayu tetapi sekadar ejen yang membayar di Amerika.

(2) Adalah khilaf untuk Mahkamah Tinggi menyamakan perayu sebagai majikan dan Citibank NA sebagai pekerja perayu dan berikutan itu, memutuskan bahawa perayu bertanggungan secara vikarius. Citibank NA bukanlah pekerja perayu dan Citibank NA adalah bank bebas. Keterangan yang tidak boleh disangkal menunjukkan bahawa perayu tidak mempunyai kawalan atau kuasa ke atas Citibank NA dan bahawa Citibank NA memproses draf selaras dengan proses-proses sekuritinya. Ketiadaan kawalan tidak boleh dicabar dan ia kekal sebagai ciri tetap dalam rayuan ini.

(3) Responden bukan sahaja perlu membuktikan bahawa perayu telah menerbitkan kenyataan-kenyataan memfitnah dan bahawa kesemuanya adalah memfitnah, ia mestilah juga mengenal pasti entitinya sebagai pihak yang difitnah. Di sini, perkataan-perkataan tersebut tidak merujuk kepada responden. Perkataan-perkataan tersebut tidak secara munasabah mampu mempunyai maksud memfitnah responden. Tiada sebarang rujukan yang dibuat kepada responden. Responden tidak kelihatan pada dasar draf tuntutan, e-mel mahupun lampiran.

(4) Responden gagal membuktikan kesemua unsur-unsur bagi tindakan libel. Untuk mengeruhkan lagi perkara ini, pihak yang salah telah disaman. Keterangan menunjukkan bahawa pelabelan perkataan 'counterfeit' pada tuntutan draf bersama-sama dengan pengedaran e-mel dan lampiran dibuat oleh Citibank NA. Perayu tidak mempunyai kawalan ke atas apa yang dilakukan oleh Citibank NA.

Case(s) referred to:

Abdul Rahman Talib v. Seenivasagam & Anor [1964] 1 LNS 2 HC ***(refd)***

Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121 HC ***(refd)***

Atip Ali v. Josephine Doris Nunis & Anor [1986] 1 CLJ 320; [1986] CLJ (Rep) 283 HC ***(refd)***

Ayob Saud v. TS Sambanthamurthi [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321 HC ***(refd)***

Bata Shoe Company (Malaya) Ltd v. Employees Provident Fund Board [1966] 1 LNS 18 HC ***(refd)***

Citizens' Life Assurance Company Ltd v. Brown [1904] AC 423 PC ***(refd)***

Great One Coconut Products Industries (M) Sdn Bhd v. Malayan Banking Bhd [1985] 2 CLJ 390; [1985] CLJ (Rep) 482 HC ***(refd)***

Honeywill & Stein Ltd v. Larkin Brothers (London's Commercial Photographers) Ltd [1934] 1 KB 191 ***(refd)***

JB Jeyaretnam v. Goh Chok Tong [1984] 1 LNS 139 HC ***(refd)***

JB Jeyaretnam v. Lee Kuan Yew [1978] 1 LNS 71 CA ***(refd)***

KEP Mohamed Ali v. KEP Mohamed Ismail [1980] 1 LNS 169 FC ***(refd)***

Knupffer v. London Express Newspaper Ltd [1944] AC 116 HL ***(refd)***

Koh Siak Poo v. Sayang Plantation Bhd [2002] 1 CLJ 501 CA ***(refd)***

Lau Chee Kuan (f) v. Chow Soong Seong & Ors [1955] 1 LNS 47 HC ***(refd)***

Lee Anthony Freer v. Mr Aurang Zeb, Person unknown aka 'Boo', Claire Marie McBride [2008] EWHC 212 QB ***(refd)***

Lee Kuan Yew v. Derek Gwyn Davies & Ors [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691 HC ***(refd)***

Lever Brothers Ltd v. Bell [1931] 1 KB 557 ***(refd)***

Lim Gim Seah v. Lokman Talib & Ors [2012] 5 CLJ 561 CA ***(refd)***

Lister and Others v. Hesley Hall Ltd [2001] ICR 665 HL ***(refd)***

Quah Swee Khoon v. Sime Darby Bhd [2001] 1 CLJ 9 CA ***(refd)***

R Murugason v. The Straits Times Press (1975) Ltd [1984] 1 LNS 31 HC ***(refd)***

SB Palmer v. AS Rajah & Ors [1947] 1 LNS 94 HC ***(refd)***

Soh Chun Seng v. CTOS-EMR Sdn Bhd [2004] 5 CLJ 46 HC ***(refd)***

South Hetton Coal Company Limited v. North-Eastern News Association Limited [1894] 1 QB 133 CA ***(refd)***

Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor [1973] 1 LNS 146 HC ***(refd)***

UG Hotel Property Sdn Bhd v. Chee Soo Lam & Anor [2013] 2 MLJ 235 CA ***(refd)***

Yew Wan Leong v. Lai Kok Chye [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330 SC ***(refd)***

Yewens v. Noakes [1880] 6 QBD 530 ***(refd)***

Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd [1934] 50 TLR 581 CA ***(refd)***

For the appellant - Sean Yeow (Hoi Jack S'ng with him); M/s Lee Hishamuddin, Allen & Gledhill

For the respondent - Lee Chuen Tiat; M/s Ros, Lee & Co

[Appeal from High Court, Kuala Lumpur; Suit No: S3-23-107-2001]

Reported by Najib Tamby

JUDGMENT

Abdul Malik Ishak JCA:

Introduction

[1] The respondent that goes by the name of Moon Trading Sdn Bhd was the plaintiff before the High Court, while the appellant bank known as the RHB Bank Berhad was the defendant before the High Court. The other panel of this court by an order dated 22 June 2011 ordered that the civil action before the High Court to proceed only on the issue of defamation.

[2] After a full trial, the High Court found the appellant bank liable for defamation and ordered damages to be assessed in favour of the respondent. Aggrieved, the appellant bank appeals to this court.

The Salient Facts

[3] On 21 July 2006, the respondent purchased for valuable consideration from the appellant bank a bank draft in the sum of USD$2,985 payable to the respondent's supplier by the name of Pest Fog Sales Corporation ("Pest Fog"), a company in the United States of America ("USA").

[4] The clearance of the bank draft was to be made through Citibank (New York State) for Citibank NA who is the official representative and/or the paying agent of the appellant bank in USA.

[5] On 26 July 2006, Pest Fog presented the bank draft for payment through the American Bank as the collecting bank.

[6] On 27 July 2006, the bank draft was dishonoured by Citibank NA on the ground that it was a counterfeit instrument.

[7] On 31 July 2006, Miss Farith Conguta from the Citigroup sent an email to Miss Kelly of the American Bank informing her that the bank draft was a counterfeit. A copy of the bank draft labelled by Citibank NA with the word "counterfeit" was also attached together with the e-mail to Miss Kelly. Miss Farith Conguta's e-mail reads as follows:

> Ms Kelly,
>
> As per our telephone conversation, I am an investigator for Citigroup Investigative Services located at our Citigroup offices in Tampa, Florida.

A I handle a range of matters for Citigroup including investigation on stolen or counterfeit Worldlink checks.

I am writing to advise you of a counterfeit Citibank Worldlink number 292699585 in the amount of $2,985.00 payable to Pest Fog Sales Corp. deposited on 7/26/2006 at one of your branches. The check is be returned through regular banking channels and no goods or cash should be released against it.

Below you will find details and an attachment of the back of the item. Please feel free to contact our office if further information is needed.

Thanking you in advance.

[8] That very e-mail carried an attachment bearing the following particulars:

Subject: US Currency Counterfeit Return Item – IRD 292699585
Serial Number: 292699585
Client Number: 52012
Issue Amount:
Counterfeit Amount: 2,985.00
Currency Number: 02000
Date of Fraud: 7/28/2006
Type of Fraud: Counterfeit
First Cashing Bank: American Bank.

[9] In answering the question of, "What is the process adopted by the defendant – referring to the appellant bank, in regard to the issuance of a demand draft?", the appellant bank's witness in the person of Kavitha a/p Vadiveloo ("DW1") answered it in this way, at the examination-in-chief stage:

At the Branch level, a customer will fill up a remittance application form. The defendant's officer will then key in the necessary details into the system such as applicant name, demand draft number, beneficiary's name, amount, currency rate, etc. 4 copies of the demand draft will be printed and then signed – the original copy and one copy will be given to the customer (with the original copy to be given by the customer to the beneficiary) and two copies will be kept by the defendant.

At the Head Office Remittance level, the system will also at the same time capture the demand draft issued by the Branch. The defendant's IT department will compile the data at night and the same will be forwarded to Citigroup the next day.

[10] In answering the question of why the bank draft was dishonoured and classified as a counterfeit, a report from the director of the Worldlink Payment Services dated 22 September 2006 representing Citigroup corporate and investment banking and addressed to the appellant bank as seen at p. 206 of the appeal record at jilid 2, parts "B" & "C" provided the answer:

> Dear Ms Kwa,
>
> With the assistance of Citigroup Security & Investigative Services ('CSIS'), we have investigated the facts surrounding the Counterfeit Draft and have determined that an initial error was made by RHB Bank that caused the item to be flagged as counterfeit and to be returned. The error was due to RHB Bank issuing the original draft under a branch number that was different from the one assigned by Citibank to the WorldLink check stock.
>
> The timeline of events leading to this event and details of prior counterfeit cases are outlined below:
>
> > 7/21/08 – Cheque issuance was received from RHB. The cheque issuance for 292699585 posted with an incorrect branch number during update. On RHB's file, branch 0084 was listed, however this serial number was acknowledged to branch 3017. Due to this error, the issuance could not be automatically posted.

[11] The two branch numbers, namely: 3017 and 0084 mentioned by the Citigroup corporate and investment banking in their report were amply explained by DW1 in her examination-in-chief in this way (see p. 192 of the appeal record at jilid 2, parts "B" & "C"):

> The branch code of '3017' and '0084' both belongs to the defendant. However, both the branch codes serve a different function – '3017' is client number assigned by Citigroup for the different branches in their system for their own reference. The Branch will use this number when placing orders for demand drafts with Citigroup while '0084' is the defendant's internal branch code and for the defendant's own purpose only.

[12] It was submitted on behalf of the respondent that the whole tragedy was the result of one simple mistake committed by the appellant bank when issuing the bank draft at the branch level or when compiling the data at the Head Office Remittance level. Instead of keying into the system "3017" (which is the branch number assigned by the Citigroup corporate and investment

banking in order to recognise and acknowledge the bank draft), the appellant bank had mistakenly entered its own internal branch code "0084" into the system and thus rendered the bank draft not recognised by the said Citigroup.

[13] In a nutshell, the issue of defamation arose in this way:

(a) the respondent purchased a bank draft from the appellant bank made payable to Pest Fog, a company located in USA;

(b) the bank draft was dishonoured when it was presented for payment in USA; and

(c) it was Citibank NA, the paying bank in USA that labelled the bank draft as a counterfeit.

Analysis

[14] We are concerned with the core issue of whether the appellant bank can be held liable for defamation when in reality, it was Citibank NA which published the defamatory statement that the bank draft was a counterfeit.

[15] Whether a word or words can carry a defamatory meaning is purely a question of fact and it is for the court to decide. Usually the words are construed in their natural and ordinary meaning as understood by an ordinary reasonable person. Sometimes the court is asked to construe words based entirely on its legal innuendo (*JB Jeyaretnam v. Lee Kuan Yew* [1978] 1 LNS 71; [1979] 2 MLJ 282, CA).

[16] Case laws are the best guide when it comes to defining a defamatory word. Thus, according to *SB Palmer v. AS Rajah & Ors* [1947] 1 LNS 94; [1949] 1 MLJ 6; *Abdul Rahman Talib v. Seenivasagam & Anor* [1964] 1 LNS 2; [1965] 1 MLJ 142b; *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor* [1973] 1 LNS 146; [1973] 2 MLJ 56; *JB Jeyaretnam v. Goh Chok Tong* [1984] 1 LNS 139; [1985] 1 MLJ 334; and *Lee Kuan Yew v. Derek Gwyn Davies & Ors* [1990] 1 CLJ 583; [1990] 3 CLJ (Rep) 691; [1990] 1 MLJ 390, a word is construed as defamatory if the right thinking man's estimation of the plaintiff is lowered in general.

[17] Then we have the situation when a word is deemed to be defamatory if the plaintiff is exposed to hatred, contempt or ridicule as envisaged in *Abdul Rahman Talib v. Seenivasagam & Anor*

(supra); *Syed Husin Ali v. Sharikat Penchetakan Utusan Melayu Berhad & Anor (supra)*; and *JB Jeyaretnam v. Goh Chok Tong (supra)*, or such a word would cause him to be shunned or avoided (*Youssoupoff v. Metro-Goldwyn-Mayer Pictures Ltd* [1934] 50 TLR 581, CA).

[18] According to Murray-Aynsley CJ in *Lau Chee Kuan (f) v. Chow Soong Seong & Ors* [1955] 1 LNS 47; [1955] 1 MLJ 21b, CA, at p. 22, it is the court which determines whether the estimation of the plaintiff is lowered in the eyes of the law-abiding citizen. While Mathew CJ in the same case, used the barometer of the average thinking man to gauge the threshold of what would constitute a defamatory word.

[19] Now, the High Court held that the appellant bank was liable based on the principle of vicarious liability. Her Ladyship opined that the appellant bank as the master must be held liable for the act of its servant namely, Citibank NA. At p. 40 of the appeal record at jilid 1, part "A" at para. 11.2, this was what Her Ladyship said:

> 11.2 Applying the aforesaid principle of agency to the factual matrix of this present case, Citibank N.A. being an agent of the plaintiff cannot now say it is not liable as the defendant as a master is liable for the act of his servant, Citibank N.A. which it is done in the course of employment, although the particular act of labelling 'counterfeit' which gives rise to the defamation suit may not be so authorised in the sense contended by the plaintiff as alluded to in paragraph 10(i) and (ii) above.

[20] Learned counsel for the appellant bank submitted that the High Court erred in applying the principle of vicarious liability for three main reasons:

(a) that the principle of vicarious liability does not apply to a defamation claim;

(b) that even if the principle of vicarious liability is applicable to a defamation claim, it had no application in the context of the present appeal because the appellant bank had no control over Citibank NA and the latter was not the appellant bank's servant; and

(c) that Citibank NA was an independent contractor.

[21] The stand of the appellant bank was this. That the wrong party was sued and that the respondent should have sued Citibank NA and not the appellant bank.

[22] The respondent responded and submitted that the allegations that Citibank NA was an independent contractor and that the appellant bank was not liable for the act committed by Citibank NA were not pleaded by the appellant bank in their statement of defence dated 19 December 2006.

[23] The respondent pointed out that Citibank NA as the appellant bank's authorised paying agent was pleaded by the appellant bank in para. 5 of their statement of defence together with the pleas of justification and qualified privilege in answering the respondent's claim.

[24] The respondent emphasised that the fact that Citibank NA was the appellant bank's authorised paying agent was, once again, confirmed by the appellant bank in para. 3 of the statement of agreed facts as reflected at p. 80 of the appeal record at jilid 1, part "A".

[25] Now, the defences raised by the appellant bank in its statement of defence dated 19 December 2006 were as follows:

(a) justification – that it could really have been a case where a counterfeit bank draft was presented for payment bearing in mind that the bank draft was not returned to the appellant bank for investigation (see paras. 6, 7, 9 and 10.6 of the statement of defence);

(b) qualified privilege – that Citibank NA, as the agent of the appellant bank, was under a duty to make such a communication to the collecting bank as it was their common interest to ensure that all instruments presented for payment are free from fraud (see para. 10.7(a) to para. 10.7(d) of the statement of defence);

(c) separate entity – that although Citibank NA was the appellant bank's agent, the latter had no control over Citibank NA in relation to the making and publication of those defamatory statements (see paras. 5, 10.1 and 10.2 of the statement of defence);

(d) that the usage of the word "counterfeit" and the contents of the e-mail together with the attachment cannot be understood to refer to the respondent because the bank draft was issued by the appellant bank (see para. 11 of the statement of defence); and

(e) that the matter was still under investigation (see para. 13 of the statement of defence).

[26] The burden of proof is on the respondent to show that the word "counterfeit" and the contents of the e-mail together with the attachment do bear a defamatory imputation and that they convey the most serious imputation upon which the respondent relies (*R Murugason v. The Straits Times Press* (1975) Ltd [1984] 1 LNS 31; [1984] 2 MLJ 10; and *Ayob Saud v. TS Sambanthamurthi* [1989] 1 CLJ 152; [1989] 1 CLJ (Rep) 321; [1989] 1 MLJ 315). In holding that the appellant bank was liable, the High Court invoked the principle of vicarious liability based on the master and servant relationship. The High Court held that the appellant bank as a master was liable for the act of its servant, namely Citibank NA.

[27] With respect, the principle of vicarious liability has no place in the law of defamation. Recently, this court in *UG Hotel Property Sdn Bhd v. Chee Soo Lam & Anor* [2013] 2 MLJ 235, held that the trial court erred in holding that an employer was liable for defamatory statement made by his employee. Alizatul Khair, JCA writing for this court had this to say at p. 241 of the report:

> In relation to the issue of defamation, it is clear the learned judge had attributed vicarious liability for the alleged defamation statement made by the respondent's employee (the said Michelle). In our view, the principle of vicarious liability has no application to the facts of this case. Under the law of defamation, only the person who published (the alleged defamatory statement) can be held liable. We therefore found the High Court Judge erred in holding the appellant liable for defamation.

[28] Here, Citibank NA was not even the appellant bank's employee but was only the paying agent bank in USA. On the facts, the High Court erred in allowing the respondent's claim for defamation against the appellant bank when it was Citibank NA who published the defamatory statement and not the appellant bank. In our judgment, it is Citibank NA – the publisher of the defamatory statement, that is liable for defamation. And the

appellant bank cannot be held vicariously liable for the defamatory statement made by Citibank NA. The appellant bank too cannot be held liable for defamation by just entering the wrong code.

[29] It is trite law that an employer is vicariously liable for the tort committed by its employee in the course of employment. Two ingredients are required to establish the principle of vicarious liability. Firstly, there must be an "employee" and, secondly, that "employee" committed the tort "in the course of employment". And where the relationship is that of employer and employee, the first ingredient is easily satisfied. In regard to the second ingredient, the court will have to consider whether the connection between the employer-employee relationship and the tortious act is so close that it would be fair and just to impose liability on the employer (*Lister and Others v. Hesley Hall Ltd* [2001] ICR 665, HL). And this is called the "close connection" test. These two ingredients are certainly fact-sensitive.

[30] Here, Citibank NA was not the employee of the appellant bank and what Citibank NA did cannot impose liability on the appellant bank. The "close connection" test was not satisfied.

[31] Our courts favour the "control" test. Using the "control" test, workers have been held to be non-employees on the basis that the defendant was not responsible for the payment of wages and did not have control over the manner in which the work was to be performed (*Bata Shoe Company (Malaya) Ltd v. Employees Provident Fund Board* [1966] 1 LNS 18; [1967] 1 MLJ 120). The "control" test first surfaced in *Yewens v. Noakes* [1880] 6 QBD 530, where Bramwell J at pp. 532 to 533 defined a servant as "a person subject to the command of his master as to the manner in which he shall do his work". What this amounts to is this. That a servant is the person who serves. "Service" by its very word implies "submission to another". Thus, a master is entitled to order his servant and the master can tell the servant what to do and what not to do.

[32] Using the "control" test as a spring board, learned counsel for the appellant bank rightly submitted that the principle of vicarious liability hinged on the "control" test. And that the lack of control will not trigger the vicarious liability principle.

[33] According to learned counsel for the appellant bank, the agency system in the present appeal was not the usual agency principle. He pointed out that the appellant bank had no control

over the affairs of Citibank NA. He also emphasised that even if the vicarious liability principle were to apply, there was no evidence that the appellant bank had control over Citibank NA.

[34] In our judgment, it was wrong for the High Court to equate the appellant bank as the master and Citibank NA as the appellant bank's servant and flowing from that, found the appellant bank vicariously liable. Put differently, the High Court erred in law and in fact when Her Ladyship held that the appellant bank was the employer and Citibank NA as the employee.

[35] It is quite apparent that the High Court overlooked the following salient facts:

(a) The undisputed fact that Citibank NA was not an employee of the appellant bank. And it is also a well-known fact that Citibank NA is an independent bank in its own right.

(b) The undisputed evidence showed that the appellant bank had no control or authority over Citibank NA and that the latter processed the bank draft in accordance with their security processes. This is reflected in the evidence of DW1 as seen at p. 115 of the additional appeal record and for convenience it is reproduced herein:

> DC
>
> Please refer to page 7 of the common bundle (of documents), the demand draft. Who labelled the word counterfeit on the demand draft?
>
> Judge
> 7...
>
> DW1
> It was Citibank. The Defendant had no control or authority over Citibank in the process of settling payment and the labelling of the word counterfeit on the demand draft matters which related to Citibank's internal security processes.

(c) And there was no cross-examination of DW1 on this point.

[36] While acknowledging that the appellant bank did not specifically plead that Citibank NA was an independent contractor in the statement of defence dated 19 December 2006, we venture to say that the facts of the present appeal all pointed to the

direction that Citibank NA was indeed an independent contractor, free to make its own decision without being controlled by the appellant bank.

[37] We disagreed with the respondent's submission that the averment that the appellant bank was not liable for the act committed by Citibank NA was not pleaded in the statement of defence of the appellant bank dated 19 December 2006. We have anxiously perused through the appellant bank's statement of defence dated 19 December 2006 and we found passages that showed that the appellant bank had obliquely denied being liable for the acts committed by Citibank NA. Paragraph 5 of the statement of defence dated 19 December 2006 carried, *inter alia*, the following averments:

> ... Defendan tidak mempunyai kawalan langsung dan/atau autoriti ke atas tindak-tanduk Citibank dalam pelaksanaan ciri-ciri keselamatan yang digunapakai olehnya dalam membuat pembayaran ke atas mana-mana demand draft atau cek melaluinya.

[38] This would be followed by para. 7 of the statement of defence dated 19 December 2006 which stated, *inter alia*, that:

> Defendan selanjutnya menyatakan bahawa alasan yang dinyatakan oleh pihak Citibank bahawa Demand Draft tersebut adalah tiruan ('counterfeit') adalah penilaian pihak Citibank semata-mata tanpa autoriti daripada Defendan.

[39] There is also para. 10.5 of the statement of defence dated 19 December 2006 that favoured the appellant bank and it was worded as follows:

> Dalam premis ini, Defendan menafikan bahawa ia telah berniat jahat terhadap Plaintif dan adalah ditegaskan bahawa Defendan tidak wajar dikaitkan dengan pembuatan, penyiaran atau penyebaran catatan 'Counterfeit' pada Demand Draft tersebut dan juga kandungan e-mail serta 'attachment' yang berkenaan dari mana-mana segi pun.

[40] Although not happily worded, the appellant bank's statement of defence dated 19 December 2006 conveyed the message that the appellant bank was not liable for the act committed by Citibank NA.

[41] Even though Citibank NA as an independent contractor was not specifically pleaded in the statement of defence dated 19 December 2006, it did not deter learned counsel for the

appellant bank from arguing that the principle of vicarious liability has no application to an independent contractor like Citibank NA bearing in mind that the facts which showed that Citibank NA was an independent contractor were pleaded. It is trite law that there is no vicarious liability if the tortfeasor, just like Citibank NA, is an independent contractor.

[42] Now, the undisputed evidence showed that Citibank NA was not under the control of the appellant bank. And the absence of control by the appellant bank over Citibank NA cannot be challenged and it remained a permanent feature in this appeal.

[43] The appellant bank certainly cannot demand Citibank NA to honour the bank draft. That by itself indicate that the appellant bank had no control over Citibank NA who was an independent contractor.

[44] We reiterate that, although the appellant bank did not specifically plead that Citibank NA was an independent contractor, yet all the material facts were pleaded. It must be stated that only the material facts are to be pleaded and not the legal consequences. It has always been the practice of the courts to consider and deal with the legal result of the pleaded facts although the particular legal result alleged is not stated in the pleading. Towards this end, it is ideal to refer to the case of *Quah Swee Khoon v. Sime Darby Bhd* [2001] 1 CLJ 9; [2000] 2 MLJ 600, a decision of this court. There, Gopal Sri Ram JCA (later FCJ) writing for this court had this to say at p. 605 of the report:

> In respect of the first ground, the learned judge concluded that the Industrial Court by referring to a breach of an implied term of trust and confidence in the contract of employment between the appellant and respondent had proceeded upon an unpleaded case.

[45] Continuing at p. 611 of the report, His Lordship had this to say:

> Turning once again to the pleadings, it is abundantly clear that the appellant was complaining that he had been driven out of employment whereas the respondent was contending that the former had left of his own volition. Whether one would describe the conduct complained of as amounting to constructive dismissal or the breach of the implied term governing mutual trust and confidence is really a matter of semantics. Nothing turns upon it.

A At the end of the day, the question simply is whether the appellant was driven out of employment or left it voluntarily. Upon that question, the pleadings in the present instance are sufficiently precise.

B Ms Seah has drawn our attention to passages in well-established authorities which hold that material facts may be pleaded without the legal consequences following them. We would gratefully adopt what was said by Scrutton LJ, in *Lever Bros Ltd v. Bell* [1931] 1 KB 557 at pp 582-583:

C > The practice of the Courts is to consider and deal with the legal result of pleaded facts, although the particular legal result alleged is not stated in the pleading.

[46] Likewise here, the statement of defence dated 19 December 2006 has alluded to the relevant facts which showed that Citibank D NA was an independent contractor.

[47] Again, Gopal Sri Ram JCA (later FCJ) writing the majority judgment in *Koh Siak Poo v. Sayang Plantation Bhd* [2002] 1 CLJ 501; [2002] 1 MLJ 65, spoke of the necessary facts to sustain a E cause of action for money had and received which had been sufficiently pleaded in this way (see p. 68 of the report):

> The main thrust of the appeal is directed against the judge's finding that the respondent had established a cause of action in the quasi-contractual claim for money had and received on the F ground that there had been a total failure of consideration. In a carefully developed argument, Dato' Mahinder Singh has submitted that the statement of claim delivered by the respondent has failed to set out the essential ingredients to sustain an action for money had and received. He complains, not without justification, that the G pleaded case of the respondent is woefully bad because it does not allege either a contract or other equivalent legal basis on which a claim for money had and received is grounded.
>
> I accept, as did the learned judge, that the statement of claim is less than adequate as a perfect pleading. But equally, I must say H that I am in agreement with the learned judge and with Mr Abraham, who has argued the respondent's case before us, that the necessary facts to sustain a cause of action for money had and received, have been sufficiently pleaded in the statement of claim. The fact that the defendant was in no way misled by what the plaintiff was seeking to prove or establish is confirmed by the I defendant's defence: in the way in which the appellant has answered the allegations in the statement of claim.

[48] In *Lever Brothers Ltd, And Others v. Bell* [1931] 1 KB 557 (which was applied in *Quah Swee Khoon v. Sime Darby Bhd (supra)*), Scrutton LJ saw no necessity to amend the pleadings because the facts showed the existence of the mutual mistake between the parties. At pp. 582 to 584, this was what His Lordship said:

> The learned judge, citing a number of cases, has held that the facts of this case bring it within the scope of the proposition that where two parties enter into an agreement under a mutual mistake as to the identity or existence or fundamental nature of the subject matter, the contract is void, and money paid under it can be recovered. The defendants object to this decision on two grounds: first, that mutual mistake is not pleaded; secondly, that the facts of this case do not bring it within the authorities cited, the mutual mistake being only as to an incident of a really existing contract, a fact which does not in itself avoid an existing contract, but only gives rise to a power to avoid it, which had not been exercised when the payments sought to be recovered were made. I understood them to suggest that the employer did not know what had happened, the employee had known what had happened, but had either forgotten it or did not understand its possible legal effect, and that this was not a 'mutual mistake'.
>
> As to the pleading point, I think it is correct to say that the plaintiffs did not allege in their pleadings mutual mistake as a ground for treating the contract for payment as void and recovering the money paid under it. Clause 26 of the claim, repeated in the amended claim, was as follows: 'Alternatively the said agreements and each of them were made and the moneys paid thereunder were paid under a mistake of fact,' but the particulars of this paragraph in the letter of January 21, 1930, I think refer only to the mistake of the plaintiffs. In my opinion the practice of the Courts has been to consider and deal with the legal result of pleaded facts, though the particular legal result alleged is not stated in the pleadings, except in cases where to ascertain the validity of the legal result claimed would require the investigation of new and disputed facts which have not been investigated at the trial. Now in the present case there is no dispute that the plaintiffs did not know at the time they negotiated the cancellation agreement of the private speculations of the defendants, and would not have entered into the cancellation agreement if they had known of them. They were under a mistake as to the legal position of the defendants in respect to their agreement of service; they thought that agreement could only be

A terminated with the consent of the defendants, whereas they, the plaintiffs, could terminate it at once without the consent of the defendants and without paying 50,000l. This mistake was pleaded. The defendants were in a difficulty: if they said they were under no mistake as to their position under the agreement of service, they had broken that agreement; they had not disclosed their
B breaches to their employers, and they were taking money which, owing to their conduct, they could not properly claim from employers whom they had kept in ignorance of that conduct which prevented their claiming the money as of right. This would tell against them on the issues of fraudulent concealment and
C misrepresentation. But the jury have found this was not their position, which must have been that they honestly but mistakenly believed that their contract of service could not have been terminated without their consent or the money payment they demanded. The learned judge obviously had mutual mistake in his mind during the trial; one at least of the cases cited during the
D argument turned on it: *Galloway v. Galloway* 30 Times L.R. 531, a case of a mutual mistake as to the existence of a valid marriage. [The Lord Justice then read a passage from the shorthand note taken at the trial, showing that the effect of the mutual mistake upon the validity of the compensation agreements
E had been raised in the Court below, and continued:] In my opinion, therefore, the question as to mutual mistake needs no further evidence to elucidate its legal effect, and can be dealt with on the facts admitted and found by the jury or inferred by the judge without any amendment of the pleadings.

F **[49]** We would like to make it clear that the background facts as set out in the respondent's statement of claim and the appellant bank's statement of defence together with the respondent's reply to the defence showed that Citibank NA was an independent contractor and there was thus no necessity for the appellant bank
G to specifically plead that Citibank NA was an independent contractor. The peculiar facts of the present appeal necessitated the arrival of that decision. It is not meant to whittle down the rule that the parties are bound by their pleadings and that the trial of the suit is confined to their pleadings (*Yew Wan Leong v. Lai*
H *Kok Chye* [1990] 1 CLJ 1113; [1990] 1 CLJ (Rep) 330; [1990] 2 MLJ 152, SC, at p. 333 (CLJ Rep); p. 154 (MLJ); and *Asia Hotel Sdn Bhd v. Malayan Insurance (M) Sdn Bhd* [1992] 2 CLJ 1185; [1992] 2 CLJ (Rep) 121; [1992] 2 MLJ 615). It is germane, at this juncture, to refer to the speech of Raja Azlan
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Shah CJ (Malaya) in *KEP Mohamed Ali v. KEP Mohamed Ismail* [1980] 1 LNS 169; [1981] 2 MLJ 10, at p. 12 (MLJ). There, His Majesty had this to say:

> As one of the objects of modern pleadings is to prevent surprise, we cannot for one moment think that the defendant was taken by surprise. To condemn a party on a ground of which no material facts have been pleaded may be as great a denial of justice as to condemn him on a ground on which his evidence has been improperly excluded.

[50] The test to determine whether the actual wrongdoer is a servant or an agent or an independent contractor was laid down by the English Court of Appeal in *Honeywill & Stein Ltd v. Larkin Brothers (London's Commercial Photographers) Ltd* [1934] 1 KB 191. There Slesser LJ had this to say at p. 196 of the report:

> It is well established as a general rule of English law that an employer is not liable for the acts of his independent contractor in the same way as he is for the acts of his servants or agents, even though these acts are done in carrying out the work for his benefit under the contract. The determination whether the actual wrongdoer is a servant or agent on the one hand or an independent contractor on the other depends on whether or not the employer not only determines what is to be done, but retains the control of the actual performance, in which case the doer is a servant or agent; but if the employer, while prescribing the work to be done, leaves the manner of doing it to the control of the doer, the latter is an independent contractor.

[51] Anantham Kasinather, JCA writing the judgment of this court in *Lim Gim Seah v. Lokman Talib & Ors* [2012] 5 CLJ 561; [2012] 4 MLJ 308 alluded to the test that highlighted the role of the independent contractor. At p. 575 (CLJ); pp. 320 to 321 (MLJ), this was what His Lordship said:

> First, we do not agree with counsel for the appellant that the test to determine whether a wrongdoer is a servant or agent or independent contractor varies depending on whether the works are being undertaken in the highway or elsewhere. In our judgment, the test is the same as is evident from this passage in the leading judgment of Lord Justice Widgery in the case of *Salsbury v. Woodland and others* [1970] 1 QB 324 at pp 336-337:
>
> > It is trite law that an employer who employs an independent contractor is not vicariously responsible for the negligence of that contractor. He is not able to control the way in which the independent contractor does the work, and the

vicarious obligation of a master for the negligence of his servant does not arise under the relationship of employer and independent contractor.

[52] The available evidence showed that the appellant bank was not and could not have been the master to Citibank NA. For all intents and purposes, Citibank NA was the paying agent bank in USA and an independent contractor with full and complete control over the manner it processed the bank draft for payment.

[53] The High Court erroneously applied the case of *Citizens' Life Assurance Company Ltd v. Brown* [1904] AC 423, PC, and overlooked the fact that the person who published the defamatory statement in that case was a person by the name of Fitzpatrick who was the employee of the company. Here, it was Miss Farith Conguta from the Citigroup who sent the e-mail to Miss Kelly of the American Bank informing her that the bank draft was a counterfeit. The appellant bank was not the author or the publisher of the defamatory statement.

[54] It is of crucial importance that the respondent must establish that the defamatory remarks – referring to the word "counterfeit" together with the contents of Miss Farith Conguta's e-mail and the attachment, were published and it concerned the respondent (*Atip Ali v. Josephine Doris Nunis & Anor* [1986] 1 CLJ 320; [1986] CLJ (Rep) 283; [1987] 1 MLJ 82). Put in another way, the respondent must not only prove that the appellant bank published the defamatory remarks and that they are defamatory, the respondent must also identify itself as the party defamed. According to Viscount Simon LC in the case of *Knupffer v. London Express Newspaper Ltd* [1944] AC 116, HL at p. 118, "... it is an essential element of the cause of action for defamation that the words complained of should be published 'of the plaintiff."

[55] It is simple and straightforward in a situation where the claimant is expressly identified by name, then it is not necessary to produce evidence that anyone to whom the statement was published did identify the claimant. The pertinent question is not whether anyone did identify the claimant but whether persons who were acquainted with the claimant could identify him from the words used. In *Lee Anthony Freer v. Mr Aurang Zeb, Person unknown aka 'Boo', Claire Marie McBride* [2008] EWHC 212 QB at 47, is a case in point. There, the claimant's first name was used and the judge considered that there would be no publication to persons who did not know who was being spoken of.

[56] The court in determining whether the statements are made of or concerning the claimant, must examine the statement as a whole. The pertinent question to pose would be whether a fair-minded reader "not avid for scandal" and "not unduly suspicious" would reasonably come to the conclusion that the statement when read as a whole referred to the plaintiff claimant (*Lee Kuan Yew v. Derek Gwyn Davies & Ors (supra)*).

[57] A company or corporation may institute a civil action for libel or slander just like an individual would (*Great One Coconut Products Industries (M) Sdn Bhd v. Malayan Banking Bhd* [1985] 2 CLJ 390; [1985] CLJ (Rep) 482; [1985] 2 MLJ 469). It must be the company or corporation who is libelled or slandered and not the officials or its members (*South Hetton Coal Company Limited v. North-Eastern News Association Limited* [1894] 1 QB 133; [1891-1894] All ER Rep 548, CA).

[58] A company or corporation cannot maintain an action for libel or slander on behalf of its officers and directors in respect of disparaging words published or uttered against them. The officers and directors should institute the actions themselves.

[59] But if a company or corporation deals in trade, it would have a reputation to keep. On this basis, it can institute an action for libel or slander in a situation where a statement made injures its trade or business (*South Hetton Coal Company Limited v. North-Eastern News Association Limited (supra)*) provided it can show that the words are defamatory, the words refer to the company or corporation and the words are published (*Ayob bin Saud v. TS Sambanthamurthi (supra)*).

[60] Here, on the facts, the words do not refer to the respondent. No reference whatsoever is made about the respondent be it in the demand draft or in the e-mail or in the attachment. It is correct to say that the respondent does not appear on the face of the demand draft or in the e-mail or in the attachment. In fact, the words refer to the appellant bank as the demand draft is the defendant bank's demand draft.

[61] In our judgment, in their natural and ordinary meaning, the words complained of does not have the meaning ascribed to them by the respondent either in its pleading or in its evidence. The words are not reasonably capable of bearing a meaning defamatory of the respondent.

[62] What is clear is this: that the words are defamatory of the appellant bank. It shows that the appellant bank had issued a counterfeit bank draft. The sum total of it all would be this: that the respondent has failed to prove all the ingredients for an action for libel (*Ayob Saud v. TS Sambanthamurthi (supra)*; and *Soh Chun Seng v. CTOS-emr Sdn Bhd* [2004] 5 CLJ 46; [2003] 4 MLJ 180).

[63] To compound the matter further, the wrong party was being sued. The evidence showed that the labelling of the word "counterfeit" on the demand draft together with the circulation of the e-mail and attachment were done by Citibank NA. The appellant bank has no control over what Citibank NA did. It is no answer for the respondent to say that if the wrong party was sued, the appellant bank should have taken the earliest possible opportunity to strike out the respondent's suit which was initiated in 2006.

Conclusion

[64] For these varied reasons, we unanimously allowed the appeal with costs of RM25,000 here and below. We set aside the decision of the High Court. The sum of RM127,013.70 paid by the appellant bank on 8 March 2013 as damages for defamation to be repaid by the respondent with interest thereon at five percent (5%) per annum from 8 March 2013 until payment.

[65] The deposit should be refunded to the appellant bank.